

§ 768.2

controls would prove detrimental to the national security of the United States. Once the President makes such a decision, the President must actively pursue negotiations to eliminate foreign availability with the governments of the sources of foreign availability. (See § 768.7 of this part).

Non-controlled countries. Any country not defined as a controlled country by this section.

Non-U.S. source/foreign source. A person located outside the jurisdiction of the United States (as defined in part 772 of the EAR).

Reasonable evidence. Relevant information that is credible.

Reliable evidence. Relevant information that is credible and dependable.

Secretary. As used in this part, the Secretary refers to the Secretary of Commerce or his/her designee.

Similar quality. An item is of similar quality to an item that is controlled under the EAR if it is substantially alike in key characteristics that may include, but are not limited to: (1) Function; (2) technological approach; (3) performance thresholds; (4) maintainability and service life; and (5) any other attribute relevant to the purpose for which the control was placed on the item.

Sufficient quantity. The amount of an item that would render the U.S. export control, or the denial of the license in question, ineffective in achieving its purpose. For a controlled country, it is the quantity that meets the military needs of that country so that U.S. exports of the item to that country would not make a significant contribution to its military potential.

Technical Advisory Committee (TAC). A Committee created under section 5(h) of the EAA that advises and assists the Secretary of Commerce, the Secretary of Defense, and any other department, agency, or official of the Government of the United States to which the President delegates authority under the EAA on export control matters related to specific areas of controlled items.

TAC certification. A statement that a TAC submits to BXA, supported by reasonable evidence, documented as in a FAS, that foreign availability to a controlled country exists for an item that

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falls within the TAC's area of technical expertise.

[61 FR 12915, Mar. 25, 1996, as amended at 61 FR 68585, Dec. 30, 1996; 62 FR 25469, May 9, 1997]

§ 768.2 Foreign availability described.

(a) *Foreign availability.* Foreign availability exists when the Secretary determines that an item is comparable in quality to an item subject to U.S. national security export controls, and is available-in-fact to a country, from a non-U.S. source, in sufficient quantities to render the U.S. export control of that item or the denial of a license ineffective. For a controlled country, such control or denial is “ineffective” when maintaining such control or denying a specific license would not restrict the availability of items that would make a significant contribution to the military potential of the controlled country or combination of countries detrimental to the national security of the United States (see sections 5(a) and 3(2)(A) of the EAA.)

(b) *Types of foreign availability.* There are two types of foreign availability:

(1) Foreign availability to a controlled country; and

(2) Foreign availability to a non-controlled country.

(NOTE TO PARAGRAPH (b) OF THIS SECTION: See § 768.7 of this part for delineation of the foreign availability assessment procedures, and § 768.6 of this part for the criteria used in determining foreign availability)

§ 768.3 Foreign availability assessment.

(a) *Foreign availability assessment.* A foreign availability assessment is an evidentiary analysis that BXA conducts to assess the foreign availability of a given item according to the assessment criteria, based on data submitted by a claimant, the data gathered by BXA, and the data and recommendations submitted by the Departments of Defense and State and other relevant departments and agencies, TAC committees, and industry. BXA uses the results of the analysis in formulating its recommendation to the Secretary on whether foreign availability exists for a given item. If the Secretary determines that foreign availability exists, the Secretary will decontrol the item

for national security reasons or approve the license in question if there is no foreign policy reason to deny the license, unless the President exercises a National Security Override (see § 768.7 of this part). The effect of any such determination on the effectiveness of foreign policy controls may be considered independent of this part.

(b) *Types of assessments.* There are two types of foreign availability assessments:

- (1) Denied license assessment; and
- (2) Decontrol assessment.

(c) *Expedited licensing procedures.* See § 768.8 of this part for the evaluation of eligibility of an item for the expedited licensing procedures.

[61 FR 12915, Mar. 25, 1996, as amended at 61 FR 68585, Dec. 30, 1996]

§ 768.4 Initiation of an assessment.

(a) *Assessment request.* To initiate an assessment, each claimant or TAC must submit a FAS or a TAC Certification to BXA. TACs are authorized to certify foreign availability only to controlled countries. Claimants can allege foreign availability for either controlled or non-controlled countries.

(b) *Denied license assessment.* A claimant whose license application BXA has denied, or for which it has issued a letter of intent to deny on national security grounds, may request that BXA initiate a denied license assessment by submitting a Foreign Availability Submission (FAS) within 90 days after denial of the license. As part of its submission, the claimant must request that the specified license application be approved on the grounds of foreign availability. The evidence must relate to the particular export as described on the license application and to the alleged comparable item. If foreign availability is found, the Secretary will approve the license for the specific items, countries, and quantities listed on the application. The denied license assessment procedure, however, is not intended to result in the removal of the U.S. export control on an item by incrementally providing a country with amounts that, taken together, would constitute a sufficient quantity of an item. The Secretary will not approve on foreign availability grounds a denied license if the approval of such li-

cense would itself render the U.S. export control ineffective in achieving its purpose. In the case of a positive determination, the Secretary will determine whether a decontrol assessment is warranted. If so, then BXA will initiate a decontrol assessment.

(c) *Decontrol assessment.* (1) Any claimant may at any time request that BXA initiate a decontrol assessment by a FAS to BXA alleging foreign availability to any country or countries.

(2) A TAC may request that BXA initiate a decontrol assessment at any time by submitting a TAC Certification to BXA that there is foreign availability to a controlled country for items that fall within the area of the TAC's technical expertise.

(3) The Secretary, on his/her own initiative, may initiate a decontrol assessment.

(d) *BXA mailing address.* All foreign availability submissions and TAC certifications should be submitted to: Department of Commerce, Bureau of Export Administration, 14th Street and Pennsylvania Avenue, NW, Room 3877, Washington, DC 20230.

§ 768.5 Contents of foreign availability submissions and Technical Advisory Committee certifications.

(a) All foreign availability submissions must contain, in addition to information on product or technology alleged to be available from foreign sources, at least:

- (1) The name of the claimant;
- (2) The claimant's mailing and business address;
- (3) The claimant's telephone number; and
- (4) A contact point and telephone number.

(b) Foreign availability submissions and TAC certifications should contain as much evidence as is available to support the claim, including, but not limited to:

- (1) Product names and model designations of the items alleged to be comparable;
- (2) Extent to which the alleged comparable item is based on U.S. technology;
- (3) Names and locations of the non-U.S. sources and the basis for claiming